APPENDIX A - DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 21, 2003 AFFIRMING DISTRICT COURT ORDER DENYING PETITION FOR HABEAS CORPUS WRIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2002

(Argued: March 11, 2003 Decided: March 21, 2003)

Docket No. 02-2318

ELKANAH REID,
Petitioner-Appellant,
v.
FRANCIS M. HOLMES, as District Director of the Immigration & Naturalization Service, Upstate New York District Office; JANET RENO, as Attorney General of the United States; DORIS MEISSNER, as Commissioner of the Immigration & Naturalization Service, Respondents-Appellees.

Before: MESKILL, CARDAMONE and CABRANES, Circuit Judges.

The petitioner appeals from an order entered in the United States District Court for the Western District of New York (David G. Larimer, Judge) denying his petition for a writ of habeas corpus. The District Court held that Reid had served a five year term of imprisonment and, therefore, that § 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052, as technically amended by Pub. L. No. 102-232, 105 Stat. 1733, precluded Reid from being able to seek a waiver of deportation pursuant to §212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c).

Affirmed.

STEPHEN M. BRENT,
Brent & Roberts,
Rochester, NY,
for Petitioner-Appellant.

ETHAN B. KANTER, Senior Litigation Counsel (Michael P. Lindemann, Assistant Director, *of counsel,* Robert D. McCallum, Assistant Attorney General, *on the brief),* Office of Immigration Litigation, Civil Division, Department of Justice, Washington, DC., *for Respondent-Appellee.*

PER CURIAM:

Petitioner-Appellant Elkanah Reid is a native and citizen of Jamaica who entered the United States in 1981 and became a lawful permanent resident in 1983. On February 15, 1989, Reid was convicted in the County Court for the County of Monroe, State of New York of unlawful possession and sale of cocaine in violation of New York Penal Law § § 220.18 and 220.41. Reid was sentenced to two terms of imprisonment of five years to life, to run concurrently.

On June 7, 1993, the United States Immigration and Naturalization Service ("INS") commenced a deportation proceeding against Reid as a result of his criminal conviction. On January *25,* 1994, the immigration judge found Reid deportable and ordered him deported to

Jamaica.[1] After a series of appeals and remands, the Board of Immigration Appeals ("BIA") ultimately dismissed Reid's appeal on March 2, 2000.

On September 21, 2000, Reid filed a petition for a writ habeas corpus pursuant to 28 U.S.C.§ 2241 in the United States District Court for the Western District of New York. The District Court (David G. Larimer, Judge) denied Reid's petition on April 25, 2002.

In his petition, Reid first argued that the immigration court erred by retroactively applying § 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5052, as technically amended by Pub. L. No. 102-232, 105 Stat. 1733, to preclude Reid from being able to seek a waiver of deportation pursuant to § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). The District Court held that this argument was barred by our decision in *Buitrago-Cuesta v. INS*, 7 F.3d 291 (2d Cir. 1993). We agree: Our opinion in *Buitrago-Cuesta* clearly established that § 511(a) of the Immigration Act of 1990 could be applied retroactively to aliens whose criminal convictions pre-dated the statute's enactment. 7 F.3d at 294. *Cf Rankine v. Reno*, 319 F.2d 93 (2d Cir. 2003) (the repeal of §212(c) applies retroactively to an alien who was convicted, following trial, of an aggravated felony while §212(c) was still in effect).

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1. Following the passage of the Illegal Immigration Reform and Responsibility Act, pub. L. No. 104-208, 110 Stat. 3009 (1996), the term "removal" is now used in place of the term "deportation." Because the immigration judge ruled before the effective date of this Act, however, he properly employed the various forms of the word "deport" rather than those of the term "remove."

Reid argues that our holding in *Buitrago-Cuesta* has been called into doubt by more recent Supreme Court cases including *INS v. St. Cyr*, 533 U.S. 289 (2001), but none of the cases he cites speak directly to the issue at hand. Accordingly, to the extent that Reid asks us to revisit this issue, we are obligated to decline. See, e.g., *United States v. Curcio,* 712 F.2d 1532, 1542 (2d Cir. 1983) (holding that our prior decisions may only be overruled by a decision of the *en banc* Court).

Reid also argues that the immigration judge, the BIA, and the District Court all erred in concluding that he had been imprisoned for five years. Specifically, he claims that he was only imprisoned for four years and 364 days because, on one occasion, he surrendered to authorities from his work furlough program one day late and, under New York Penal Law §70.30(7), the failure to return from work release at a scheduled time interrupts a prisoner's sentence. Because §511(a) of the Immigrations Act of 1990 only eliminated eligibility for §212(c) relief for aggravated felons incarcerated for five years or more, Reid reasons that he was improperly denied an opportunity to seek a waiver of deportation pursuant to § 212(c).

Section 101 (a)(48)(B) of the INA states that "[a]ny reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."* 8 U.S.C. § 1101(a)(48)(B) (emphasis added). Accordingly, for purposes of the immigration law, Reid was imprisoned for five years despite his having absconded for one day from work release.

For the foregoing reasons, we affirm the judgment of the District Court.

APPENDIX B - DECISION OF UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, FILED APRIL 25, 2002 DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELKANAH REID, #A26222 1964,

Petitioner,

DECISION AND ORDER

-vs- 00-C V-6466L(Fe)

M. FRANCIS HOLMES, as District Director of the Immigration and Naturalization Service, JANET RENO, as Attorney General of the United States, DORIS MEISSNER, as Commissioner of the Immigration and Naturalization Service, and UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

Presently before the Court is petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. For the reasons that follow, the petition is dismissed.

BACKGROUND

Petitioner Elkanah Reid is a native and citizen of Jamaica. (AR. 133).[1] Petitioner entered the United States in 1981 and became a lawful permanent resident alien in 1983. (AR. 133,403). On February 15, 1989, petitioner was convicted, after a bench trial, of criminal sale of a controlled substance (cocaine) (N.Y. Penal L.§220.41) and criminal possession of a controlled substance (cocaine) (N.Y. Penal L. § 220.21). (AR. 2, 135). Petitioner was

1. References preceded by "AR" refer to pages of the certified administrative record submitted to the Court by respondents.

sentenced to concurrent terms of incarceration of five years to life. (AR.5, 135).

On June 7, 1993, the United States Immigration and Naturalization Service ("INS") commenced a deportation proceeding against petitioner based upon the INS's determination that petitioner was subject to deportation as a result of his criminal conviction. (AR. 398, 400). Following a hearing, at which petitioner was represented by counsel, the immigration judge (IJ) found petitioner deportable as charged and ordered him deported to Jamaica. (AR. 133). On August 31, 1995, petitioner filed an appeal with the Board of Immigration Appeals (BIA). (AR. 126). On March 5, 1997, the BIA issued an Order permitting petitioner to move to re-open the proceedings if, prior to the enactment of AEDPA, he had conceded deportability in reliance on the availability of §212(c) relief. (AR. 53). Petitioner moved to re-open on June 13, 1997. (AR. 46). On August 4, 1997, the BIA granted the motion to re-open but, finding petitioner deportable as charged, dismissed the appeal. (AR. 27). Petitioner filed a petition for review with the United States Court of Appeals for the Second Circuit and, on September 9, 1999, the matter was remanded to the BIA. (AR. 25). On March 2, 2000, the BIA dismissed petitioner's appeal. (AR. 2).

On September 21,2000, petitioner filed the instant habeas corpus proceeding, arguing that: (1) the five-year imprisonment bar, added to the Immigration and Nationality Act ("INA") by §511(a) of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 5052, as technically amended by Pub. L. No. .102-232, 105 Stat. 1773, was applied to his 1989 conviction in an impermissibly

retroactive manner, and (2) that, in any event, petitioner did not serve five years of imprisonment because his aggregate time incarcerated did not add up to five years. Respondent filed a response to the petition (Docket No.7) on February 28,2001. Petitioner filed a reply to the response (Docket No. 9) on April 5, 2001.

DISCUSSION

Petitioner argues that § 511(a) of IMMACT, which foreclosed the possibility of § 212(c) relief for aliens convicted of aggravated felonies who had served prison terms of at least five years, is being applied to his 1989 conviction in an impermissibly retroactive manner. However, as petitioner acknowledges, in 1993 the United States Court of Appeals for the Second Circuit held that IMMACT applied retroactively. *Buitrago-Cuesta v. INS,* 7 F.3d 291 (1993). While petitioner argues that the Second Circuit's decision in *St. Cyr v INS,* 229 F.3d 406(2000), *aff'd,* 533 U.S. 289 (2001),[2] overturns *Buitrago-Cuesta,* this Court does not find petitioner's argument persuasive. In *St. Cyr,* the Supreme Court, relying on the two-part test enunciated in *Landgraf v. USI Film Prods.,* 511 U.S. 244,260-61(1994), found that the language of § 304 of IIRIRA (which eliminated § 212(c) relief) was ambiguous. *St. Cyr,* 533 U.S. at 322-23. The Court then considered whether the retroactive application of §304 would be contrary to considerations of fair notice, reasonable

2.The Court notes that the pleadings in this matter were filed prior to the Supreme Court's decision in *Immigration and Naturalization Service v. St. Cyr,* 533 U.S. 289 (2001).

reliance and settled expectations. *Id.* The Court held that such retroactive application would be unfair to aliens who had pleaded guilty, because "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or go to trial." *Id.* at 323. For that reason, the Court "held that §212(c) relief remains available for aliens, like *St. Cyr*, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for §212(c) relief at the time the plea under the law then in effect." *Id.* at 326. The Second Circuit, and the other courts that have reviewed § 511(a), found no such ambiguity in its language. *See Buitrago-Cuesta,* 7 F.3d 291,294-95; see also *Scheidemann v. INS,* 83 F.3d 1517, 1525-26 (3rd Cir. 1996); *Samaniego-Meraz v. INS,* 53 F.3d 254,257(9th Cir. 1995);*Ascencio v. INS,* 37 F.3d 614,617(11th Cir. 1994) (per curiam); *Campos v. INS,* 16 F.3d 118, 121 (6th Cir. 1994); *De Osorio v. INS,* 10 F.3d 1034, 1039-42(4th Cir.1993). Further, unlike the petitioner in *St. Cyr,* petitioner here was convicted after trial. This Court has reviewed both the Supreme Court and Second Circuit's decisions in *St. Cyr* and finds nothing in either decision that would lead one to the conclusion that *Buitrago-Cuesta* is no longer good law.[3] Further, those courts

3. The Court notes that petitioner argues that St. Cyr's holding shows a reluctance to penalize pre-enactment conduct. However, in Domond v. INS, 244 F.3d 81,84 (2d Cir. 2001), the Second Circuit held that the application of AEDPA where a petitioner's criminal conduct, but not his guilty plea, predated the enactment of the statute was not impermissibly retroactive because it did not upset the "familiar considerations of fair notice, reasonable reliance, and settled expectations." Id. at 85-86. The Court's reasoning is clear, while "an alien is likely to consider the

that have revisited *Buitrago-Cuesta* following the *St. Cyr* decision have uniformly found it to be good law.[4] *See DiSanto V. INS,* 2002 WL 10448, at **3-4 (S.D.N.Y.January 3, 2002) (holding that *Buitrago-Cuesta* remains good law); *Copes v. McElroy,* 2001 WL 830673, at *5 (S.D.N.Y. July 23, 2001) (finding *St. Cyr* inapplicable because the petitioner would not have been entitled to § 212(c) relief under *Buitrago-Cuesta,* and noting that courts who have interpreted § *511(a)* under the principles set forth in *Landgraf,* have held that 511(a) applies regardless of the date of conviction); *Mezrioui v. INS, 154* F. Supp.2d 274,277-78 (noting that the Second Circuit's decision in *St. Cyr* did not overturn *Buitrago-Cuesta).* Petitioner has not pointed to a single decision by any court which, relying on *St. Cyr,* finds that §*511(a)* has an impermissibly retroactive effect. *Buitrago-Cuesta is* the law in this Circuit and this Court must apply it. Accordingly, the Court finds that petitioner is not entitled to habeas corpus relief on this ground.

Petitioner also alleges that the IJ and BIA erred in finding that petitioner had been imprisoned for five years. The

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immigration consequences when deciding whether and how to plead," however, "it cannot. be reasonably argued that aliens 'committed crimes in reliance on a hearing that might possibly waive their deportation." Id. at 86. Thus, the Court finds petitioner's argument regarding conduct to be utterly unpersuasive.

4. The Court notes that, in a recent summary decision, the Second Circuit again stated that § 511(a) applies retroactively, citing to *Buitrago-Cuesta. Levelt v. INS,* 2002 WI. 337806 (2d Cir. March 4, 2002) (table).

Second Circuit has yet to definitively determine the degree of deference to be awarded to the INS' factual determinations on habeas corpus review. However, this Court, like others in this Circuit, finds that the appropriate standard is the substantial evidence standard used by the Second Circuit on petitions for review. *See Ahmed v. Ashcroft*, — F.3d —, 2002 WL 483512 (2d Cir. March 29, 2002) (stating that on a petition for review, the appropriate standard is substantial evidence); *see also Soto* v. *Ashcroft,* 2001 WL 1029130, at *7 (S.D.N.Y. September 7, 2001) (applying substantial evidence standard in dismissing a § 2241 petition). To reverse a finding of fact under the substantial evidence standard, this Court "must find that the evidence not only *supports* that conclusion but *compels* it." *INS v. Elias-Zacarias,* 502 U.S. 478,481, n. 1 (1992) (emphasis in original). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable minds might accept as adequate to support a conclusion." *Purveegiin v. United States INS Processing Ctr.,* 73 F. Supp.2d 411,417-18 (S.D.N.Y. 1999). Petitioner here has not met this standard, both the IJ and the BIA gave a lengthy and well-reasoned explanation of how they calculated petitioner's time of imprisonment. Petitioner offers no arguments critiquing the BIA's or IJ's findings and no new information to show why the factual findings were not supported by substantial evidence. Petitioner has simply restated the same arguments, accompanied by the same exhibits, that were submitted to, and rejected by, the U and the BIA. As petitioner has failed to provide any substantial evidence to show that the finding that he had been imprisoned for five years was erroneous, the Court finds that petitioner is

not entitled to habeas corpus relief upon this ground.

CONCLUSION

Based on the foregoing, the petition is dismissed. I also certify pursuant to 29 U.S.C. §1915(a)(3), that any appeal from this judgment would not be taken in good faith and therefore leave to appeal as a poor person is denied. *Coppedge v United States*, 369 U.S. 438 (1962)

IT IS SO ORDERED.

S/
DAVID G. LARIMER
CHIEF JUDGE
United States District Judge

April 25, 2002
Rochester, NY

APPENDIX C - ORDER OF UNITED STATES COURT OF APPEAL FOR SECOND CIRCUIT FILED JULY 3, 2003 DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNTIED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANNE B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 3rd day of July two thousand and three.

Reid,

Petitioner-Appellant, Dkt No: 02-2318

Holmes,

Respondent -Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Elkanah Reid.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

S/_____
Arthur M. Heller,
Motions Staff Attorney